

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 29, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Celmatrix Corp.
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Serial No. 90244935
—

Steven J. Hultquist of Hultquist PLLC,
for Celmatrix Corp.

Cheryl Kluwe, Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.

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Before Greenbaum, Larkin and Johnson,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

I. Background

Celmatrix Corp. (“Applicant”) filed an application seeking registration on the Principal Register of the proposed mark HAIR WATER (in standard characters) for

Hair care preparations, in International Class 3 (“Original
Goods”).¹

¹ Application Serial No. 90244935 was filed on October 9, 2020, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as merely descriptive of the Original Goods, and advised Applicant that the proposed mark appears to be generic for the Original Goods. March 21, 2021 Office Action, TSDR 1.

Applicant responded to the Section 2(e)(1) refusal by proposing an amendment to the identification of goods ("Proposed Amendment") from "Hair care preparations" to "Hair care preparations, **namely, liquid nutritional supplements for the promotion of hair health; hair care preparations, namely, powdered nutritional supplements for the promotion of hair health; dietary liquids and supplements for improving health of hair.**" April 7, 2021 Response to Office Action, TSDR 1 (emphasis supplied). Applicant presented no arguments against the Section 2(e)(1) refusal based on the Original Goods.

The Examining Attorney (1) rejected the Proposed Amendment because it exceeds the scope of Original Goods, in contravention of Trademark Rule § 2.71(a), 37 C.F.R. § 2.71(a); (2) made final the Section 2(e)(1) refusal based on the Original Goods; and (3) advised Applicant again that the proposed mark appears to be generic for the Original Goods. May 10, 2021 Final Office Action, TSDR 1.

On November 10, 2021, Applicant timely filed a Notice of Appeal and a Request for Reconsideration.² The Examining Attorney denied the Request for Reconsideration on February 16, 2022.

² The Request for Reconsideration included an amendment to the classification of goods in the Proposed Amendment from Class 3 to Class 5, but there were no changes to the text of

On February 25, 2022, the Board resumed proceedings and allowed Applicant “until April 26, 2022 in which to file its brief accompanied by the required fee.” 14 TTABVUE 1. Applicant did so, and this appeal is now fully briefed.³

For the reasons set forth below, we affirm both the refusal to accept the Proposed Amendment under Trademark Rule § 2.71(a), and the Section 2(e)(1) refusal to register based on the Original Goods. However, we first address some procedural matters.

II. Request for Remand Denied

Applicant included in its Reply Brief a request that the Board suspend the appeal and remand the application for three reasons:

- (1) so the Examining Attorney can consider previously unavailable “extrinsic evidence,” namely, Applicant’s Australian Application No. 2169737 for HAIR WATER, submitted as Appendix 1 to the Reply Brief. 18 TTABVUE 3, 12-14. Applicant claims that the Australian Application supplements Applicant’s previously submitted UK Registration No. 00003626071 and Applicant’s EU Registration No. 018449758, both for HAIR WATER, as evidence supporting its proposed amendment. 18 TTABVUE 3;⁴

the Proposed Amendment, and no arguments about the Section 2(e)(1) refusal as to the Original Goods.

³ Due to a procedural anomaly, Applicant filed an appeal brief on January 9, 2022 (4 TTABVUE), before the Examining Attorney had acted on the November 10, 2021 Request for Reconsideration. We do not further consider the January 9, 2022 appeal brief because neither Applicant nor the Examining Attorney mentioned it thereafter.

⁴ Applicant’s UK and EU Registrations are located at November 10, 2021 Request for Reconsideration, TSDR 5-16, and were resubmitted as Appendices A and B to Applicant’s Brief, 15 TTABVUE 13-18. The resubmission was unnecessary, as the UK and EU

- (2) to allow Applicant time “to confer with the Examining Attorney concerning possible amendment of the present application to the Supplemental Register upon filing of an appertaining Amendment to Allege Use” since Applicant recently started to use HAIR WATER. 18 TTABVUE 3-4; and
- (3) to allow the Examining Attorney to consider “additional extrinsic evidence” in the form of a September 6, 2021 Office Action in a third-party application, submitted as Appendix 2 to the Reply Brief, because it “presents at page 2 an analysis of the trademark HAIR VITAMIN WATER which raises common questions of law and fact that are relevant to the propriety of the Examining Attorney’s position in the present application, as well as to the consistency of USPTO examination outcomes, and due process/equal protection considerations relevant to the Applicant’s efforts to register the present mark.” 18 TTABVUE 4, 15-20.

A request under Trademark Rule § 2.142(d), 37 C.F.R. § 2.142(d), to suspend and remand for consideration of new evidence must include a showing of good cause therefor (which may take the form of a satisfactory explanation as to why the evidence was not filed prior to appeal), and it must be accompanied by the additional evidence sought to be introduced. *See, e.g., In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147 (TTAB 2011) (applicant’s request for remand denied for failure to show good cause).

Registrations were already of record. *See, e.g., In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *2 n.4 (TTAB 2020) (attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board; direct citation to evidence in the record is strongly preferred), *appeal dismissed*, No. 20-1979 (Oct. 20, 2020).

In determining whether good cause exists, the Board considers the point in the appeal process when the request for remand is made, and generally requires a stronger showing for requests that are made later in the process. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (2022). We address each of Applicant's arguments, keeping the foregoing guidelines in mind.

First, while Applicant's Australian Application was not previously available, it is merely cumulative in nature: Applicant's two other foreign registrations for HAIR WATER are of record (November 10, 2021 Request for Reconsideration, TSDR 6-9, 15-16), the Examining Attorney considered them during prosecution (February 16, 2022, Request for Reconsideration Denied, TSDR 1), and both Applicant and the Examining Attorney presented arguments about the probative value of the registrations in their briefs. Applicant's Br., 15 TTABVUE 14-16; Ex. Atty. Br., 17 TTABVUE 10-11. Moreover, we are not bound by the decisions of foreign trademark offices. *See In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *4 n.9 (TTAB 2022) ("We are, of course, not bound by this decision of the United Kingdom Intellectual Property Office.") (citation omitted).

Applicant's second reason for the requested remand is entirely speculative as Applicant has not filed an Amendment to Allege Use, and thus there is nothing for the Examining Attorney to consider.⁵

⁵ Also, as mentioned above, the Examining Attorney twice advised Applicant that the proposed mark appears to be generic for the Original Goods. March 16, 2021 Office Action, TSDR 1; May 10, 2021 Final Office Action, TSDR 1.

Applicant's third reason for remand fares no better, as it is based on extrinsic evidence that previously was available and could have been made of record during prosecution, or through an earlier (and separately) filed request for remand. *Cf. In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *1-2 (TTAB 2020) (discussing preferred practices for amending an application during appeal). In any event, there is no due process violation because Applicant was allowed a full opportunity to prosecute the application, to consider the evidence advanced by the Examining Attorney and to offer contrary evidence, and to appeal the Examining Attorney's final refusal(s) to the Board. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009). Moreover, "Applicant's allegations regarding [a] similar mark[] are irrelevant because each application must be considered on its own merits." *Id.*

"There is a point at which prosecution or examination must come to an end." TBMP § 1207.02 (example 1). We have reached that point. Applicant's request for suspension and remand is DENIED for failure to establish the requisite good cause.

III. Evidentiary Issue – Applicant's Internet Materials

Applicant's Internet materials consist of web addresses for four Internet webpages with apparently corresponding, typed excerpts of verbiage from the first three webpages, and an embedded screenshot of the fourth webpage. November 10, 2021 Request for Reconsideration, TSDR 4-5; App. Br., 15 TTABVUE 13-14. Although Applicant discussed the contents of those materials in its Request for Reconsideration and Appeal Brief, *id.*, Applicant provided only the web addresses for the first three items, not the underlying webpages or the date(s) on which they were accessed. In

the next Office Action, the Examining Attorney objected to the materials, advised Applicant how to make them of record, and stated that “the underlying webpages associated with the web addresses and/or links will not be considered.” February 16, 2022 Request for Reconsideration Denied, TSDR 1. She maintained her objection in her brief. Ex. Atty. Br., 17 TTABVUE 11. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.01(b) (July 2022) (outlining procedure for examining attorneys to object to improperly submitted Internet evidence).

We sustain the Examining Attorney’s objection to the first three of Applicant’s Internet materials as they are not properly of record. *See In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided).

The Examining Attorney also objected to the screenshot of the fourth webpage because the webpage did not specify the download/access date, citing, inter alia, *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018). February 16, 2022 Request for Reconsideration Denied, TSDR 1. After repeating the procedural advice about making Internet materials of record, she advised Applicant that she would not consider the webpage because it lacked an access date and therefore was not properly of record. *Id.*

In its brief, Applicant provided the missing access date. App. Br., 15 TTABVUE 12. The Examining Attorney objected because the access date is untimely new

evidence. Ex. Atty. Br., 17 TTABVUE 11-12. She also maintained the objection she raised during prosecution, and reiterated that she had not considered the screenshot of the fourth website when she responded to Applicant's Request for Reconsideration. *Id.* Applicant, in its Reply Brief, did not respond to the Examining Attorney's objection.

We agree with the Examining Attorney that the missing date is new evidence, and Applicant's submission thereof in the text of its Appeal Brief is untimely. *See* Trademark Rule § 2.142(d) ("The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal."). We therefore sustain the Examining Attorney's objection to the access date provided by Applicant in its Appeal Brief. Consequently, the screenshot of the fourth website is not properly of record, and we sustain the Examining Attorney's objection on that ground. *See I-Coat*, 126 USPQ2d at 1733 ("[W]e will no longer consider Internet evidence filed by an applicant in an ex parte proceeding to be properly of record unless the URL and access or print date has been identified, either directly on the webpage itself, or by providing this information in a response, except where the examining attorney does not object.").

IV. Identification of Goods

We now consider the refusal to accept the Proposed Amendment under Trademark Rule § 2.71(a), because the outcome of this issue directly affects the Section 2(e)(1) refusal to register.

A. Analysis

Trademark Rule § 2.71(a) provides, in relevant part, that “[t]he applicant may amend the application to clarify or limit, but not to broaden, the identification of goods” Where, as here, an application is filed under Section 1 of the Trademark Act, the USPTO looks to the “ordinary meaning of the wording apart from the class number designation” to determine the scope of an identification. TMEP § 1402.07(a).

To recap, Applicant seeks, through the Proposed Amendment, to amend the identification of goods from “Hair care preparations” to “Hair care preparations, **namely, liquid nutritional supplements for the promotion of hair health; hair care preparations, namely, powdered nutritional supplements for the promotion of hair health; dietary liquids and supplements for improving health of hair.**” (Emphasis added).

The Examining Attorney contends that the Proposed Amendment is beyond the scope of the unambiguous Original Goods, because the “ordinary meaning of ‘hair care preparations’ is a topical preparation used to care for hair, and ordinary consumers would not understand the term to mean dietary supplements” ... “which are foodstuffs, or are ingested orally.”⁶ Ex. Atty. Br., 17 TTABVUE 5, 8. Applicant argues that “hair care preparations” are not limited to topical preparations, and

⁶ THE AMERICAN HERITAGE DICTIONARY defines “dietary supplement” as “A product containing one or more vitamins, herbs, enzymes, amino acids, or other ingredients, that is taken orally to supplement one’s diet, as by providing a missing nutrient.” February 16, 2022 Request for Reconsideration Denied, TSDR 2.

include all products that are prepared for hair care, including preparations that are ingested. App. Br., 15 TTABVUE 10.

The identification of the Original Goods (“hair care preparations”) is not just a combination of broad and vague terms, but a phrase that is listed as an acceptable identification of goods in the USPTO Trademark ID Manual. As such, the USPTO has found the wording “hair care preparations” to be definite, as is required. *See In re Carlton Cellars, LLC*, 2020 USPQ2d 10150, at *3 (TTAB 2020) (citation omitted) (“The identification of goods and/or services must be specific, definite, clear, accurate, and concise.”).

One purpose of identifying the goods is “to provide public notice.” *See In re SICPA Holding SA*, 2021 USPQ2d 613, at *4 (TTAB 2021) (quoting *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1597 (TTAB 2014) (“[The] applicant must identify the goods and services specifically to provide public notice and to enable the USPTO to classify the goods and services properly and to reach informed judgments concerning likelihood of confusion under 15 U.S.C. § 1052(d).”). We have no doubt that the identification “hair care preparations” would convey to the public, including anyone who was searching the USPTO database, exactly what such goods are: preparations that are applied to the hair and scalp, and not dietary/nutritional supplements that are ingested.

We so find based on the evidence of record, which includes:

- A screenshot from NaturalProductsExpoConnect.com displaying various shampoos and conditioners under the subheading “hair care preparations,” May 10, 2021 Final Office Action, TSDR 2-4;
- Results from a Bing search for “hair care preparations” that returned images of more than 40 topical hair products (e.g., shampoos, conditioners, hair oils), *id.*, at TSDR 9-14; and
- Screenshots from two third-party retailers of hair care products who use the word “preparations” to refer to hair care products that are applied topically to the hair/scalp:
 - sweetsistersbodycare.com (“Sweet Sisters the art of healthy bodycare”), an online retailer of topical preparations including shampoo and conditioner, which exclaims: “It is our joy to create beautiful, healthy and meaningful **preparations** that feel wonderful, smell amazing and give your skin and hair outstanding, transforming results!”, February 16, 2022 Request for Reconsideration Denied, TSDR 21-25; and
 - the webpage for “hair care preparations” from the U.S. website for biologique-recherche.com, advertising “Our cosmetic preparations for the scalp” including lotions, hair masks, shampoos, hair balms and creams, and serums. *Id.*, at TSDR 26-27.

There is no evidence to support a finding that the ordinary meaning of “hair care preparations” includes dietary/nutritional supplements for hair health.⁷ While the term “preparations” is defined as “something that is prepared,”⁸ and there is no inherent limitation as to the use of “something that is prepared” when the word “preparations” is viewed alone, the evidence outlined above shows that the ordinary

⁷ There is, however, additional evidence from the scientific and business communities that the term “hair care preparations” refers to products that are applied to the hair and scalp, such as shampoo, conditioners, dyes, etc. *See, e.g.*, (1) November 25, 2014 article by Prakash Kailasam titled “Hair Care Preparations,” published on Aranca.com, describing the “lucrative market” in the U.S. and around the world for hair care preparations, and the focus of several “top companies,” “such as L’Oreal, Henkel, Kan Corp., Procter and Gamble and Unilever” who are filing patent applications in this “market segment,” particularly in “key focus areas” such as “products for dyeing and/or conditioning of hair,” “preparations containing conditioners and dyes for hair,” and “compositions of treatment for hair and scalp.” May 10, 2021 Final Office Action, at TSDR 5-8; (2) Screen capture from the Wiley Online Library (Hair Preparations – Clausen – Major Reference Works – Wiley Online Library), displaying a July 2016 reference article by Thomas Clausen, et al, titled “Hair Preparations,” which includes the following definition: “The term **hair preparations** covers all preparations used on the scalp or scalp hair. The most important of these are cleansing and conditioning products, colorants, hairstyling preparations (setting lotions, hair sprays, hairdressing aids), and permanent-wave preparations.” February 16, 2022 Request for Reconsideration Denied, TSDR 113 (emphasis in original); *see also id.*, at TSDR 53-110 (generally discussing types of hair preparation and related safety considerations); (3) Screen capture from the NIH National Library of Medicine (nih.gov), showing the Medical Subject Heading (MeSH) “Hair Preparations,” with the following “Scope Note”: “Hair grooming, cleansing and modifying products meant for topical application to hair, usually human. They include sprays, bleaches, dyes, conditioners, rinses, shampoos, nutrient lotions, etc.” *Id.*, at TSDR 12-13; and (4) Screen capture from Business Wire, showing an article titled “\$92.8 Billion Hair Preparations Global Market to 2030 – Identify Growth Segments for Investment.” This article describes a report from ResearchAndMarkets.com titled “Hair Preparations Global Market Report 2021: COVID-19 Impact and Recovery to 2030: “The hair preparations manufacturing market consists of the sales of hair preparations. Hair preparations include sprays, bleaches, dyes, conditioners, rinses, shampoos, nutrient lotions, etc. which are applied topically in the hair.” *Id.*, at TSDR 19; *see also id.*, at TSDR 14 from The Business Research Company.

⁸ Definition of “preparation” from the MERRIAM-WEBSTER DICTIONARY attached to February 16, 2022 Request for Reconsideration Denied, TSDR 4.

meaning of “hair care preparations” informs a specific use, i.e., preparations such as shampoos, conditioners, and serums that are applied to the hair and scalp.

Moreover, the evidence supports a finding that consumers would understand the term “hair care preparations” in the foregoing manner, and would not understand “hair care preparations” to encompass dietary liquids and nutritional supplements, which are ingested. While consumers may take certain dietary/nutritional supplements to improve the health of their hair, dietary/nutritional supplements are not “hair care preparations” as that term is commonly understood. In fact, the Proposed Amendment would fundamentally change the nature of the Original Goods. Simply put, the Proposed Amendment exceeds the scope of the Original Goods.

Applicant also argues that the Proposed Amendment is acceptable because Applicant’s use of the word “namely” permits a further specification of the goods. App. Br., 15 TTABVUE 12-13. This argument is not persuasive. Use of the word “namely” in an identification of goods is acceptable when the words that follow it further define introductory wording that precedes “namely,” using definite terms within the scope of the introductory wording (e.g., “clothing, namely, shirts”). *See* TMEP § 1402.03(a). As explained above, the words following Applicant’s use of “namely” are beyond the scope of the introductory wording.

Also, Applicant’s use of “namely” in the Proposed Amendment impermissibly introduces ambiguity into the identification of goods by potentially identifying goods in more than one International Class. As noted above, “hair care preparations” is an unambiguous term that is listed in the USPTO ID Manual as an acceptable

identification of goods in International Class 3. Dietary and nutritional supplements are in International Class 5. There is ample evidence demonstrating that consumers understand “hair care preparations” to identify topical preparations for the hair and scalp, and none to demonstrate that they understand “hair care preparations” to include dietary or nutritional supplements for hair health.

Applicant’s UK and EU Registrations for HAIR WATER, which both Applicant and the Examining Attorney refer to as “extrinsic evidence,” do not aid Applicant. App. Br., 15 TTABVUE 13-18, Appendices A and B; Ex. Atty. Br., 17 TTABVUE 10. When determining whether a proposed mark is registrable, the USPTO is not obligated to consider determinations by foreign trademark offices who operate under foreign law. *See Zuma Array*, 2022 USPQ2d 736, at *4 n.9 (USPTO not bound by UKIPO decision as to whether a proposed mark is merely descriptive). Applicant has not persuaded us that we should consider Applicant’s foreign registrations in this case.

In any event, as the Examining Attorney correctly notes, when determining whether a proposed mark is registrable, each application must be considered on its own record. Ex. Atty. Br., 17 TTABVUE 10. *In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[The Federal Circuit], like the Board must evaluate the evidence in the present record to determine whether there is sufficient evidence”); *Shinnecock Smoke Shop*, 91 USPQ2d at 1221 (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *see also Nett Designs*, 57 USPQ2d at 1566 (“Even if some prior

registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.""). As she also correctly notes, the USPTO was not involved in the review and approval process for the two registrations, Ex. Atty. Br., 17 TTABVUE 10, which were issued by foreign trademark offices under foreign trademark law.

B. Conclusion

We conclude that the Examining Attorney correctly denied the Proposed Amendment because it is beyond the scope of the Original Goods. *See* Trademark Rule 2.71(a). Accordingly, the Original Goods (and their classification in Class 3) on which the Section 2(e)(1) refusal is based remains the operative identification (and classification) of goods.

V. Mere Descriptiveness

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them.⁹ "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)

⁹ "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . ." 15 U.S.C. § 1052(e)(1). Applicant made no claim that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

(quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). See also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods.” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *Bayer*, 82 USPQ2d at 1831; see also *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). In other words, we evaluate whether someone who is familiar with the goods will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. See *Gyulay*, 3 USPQ2d at 1010. In addition, the descriptiveness analysis concentrates on the identification of goods set forth in the application. See *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

“Evidence of the public’s understanding of [a] term ... may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers and other publications,” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)), as well as “labels, packages, or in advertising material directed to the goods” *Abcor*, 200 USPQ at 218. It may also be obtained from websites and, in the case of a use-based application or registration, an applicant’s or registrant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001). “Evidence that a term is merely descriptive similarly may come from an applicant’s [or registrant’s] own usage other than that found on its labels, packaging or advertising materials.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019).

A. Analysis

The Examining Attorney asserts that HAIR WATER is descriptive of the identified “Hair care preparations” because it immediately describes a characteristic of the goods, namely, “cosmetic preparations for hair that contain, or are suspended in water.” Ex. Atty. Br., 17 TTABVUE 14. Applicant presented no argument against the merits of the Section 2(e)(1) refusal as to the Original Goods, but merely relied on

the Proposed Amendment (and corresponding reclassification from Class 3 to Class 5) to obviate the refusal.¹⁰ App. Br., 15 TTABVUE 15-18.

In support of her position, the Examining Attorney relies on the following definitions:

“Hair” -- “hairs collectively, especially those growing on a person’s head” and “any of the cylindrical, keratinized, often pigmented filaments characteristically growing from the epidermis of a mammal.” March 21, 2021 Office Action, TSDR 27-32 (quoting Lexico and THE AMERICAN HERITAGE DICTIONARY, respectively).

“Water” -- “liquid containing or resembling water: such as a (1): a pharmaceutical or cosmetic preparation made with water” and “an aqueous solution of a substance.” *Id.*, TSDR 33-49 (quoting MERRIAM-WEBSTER and THE AMERICAN HERITAGE DICTIONARY, respectively).

She also relies on excerpts from online articles in the hair-care industry and websites of third-party retailers that sell hair-care products, all of which use the term “hair water” to refer to certain hair care preparations:

- Article by Lexy Lebsack posted on the Refinery 29.com website titled “Hair Water’ Sound Like BS – But It’s Actually Genius”: “In the U.S. hair water is plain ‘ol H2O spiked with oils or silicones, plus a light fragrance. ... They typically deposit a fine mist, which allows for quick restyling, without

¹⁰ As mentioned above, Applicant took the same approach during prosecution. November 10, 2021 Request for Reconsideration, TSDR 9-10. Because we affirm the Examining Attorney’s refusal to accept the Proposed Amendment, we reiterate that the Original Goods remain the operative identification of goods on appeal.

adding a ton of product or soaking the hair. In fact, your hair will barely even be damp after application – which is a good thing.” March 21, 2021 Office Action, TSDR 2-6;

- Target: offering for sale a product in a spray bottle labeled “Kristin Ess The One Signature Hair Water” stating (on the label) that it is “for all hair types” “delicately fragrant” “style reviving” “moisture restoring” “super fine mist.” *Id.*, at TSDR 7-15;
- Patric Bradley: offering for sale a bottled product labeled “A PE Conceited, Concentrated Hair Water.” *Id.*, at TSDR 16-18;
- Article by Rosie Naraskai posted on the totalbeauty.com website titled “Hair Water Is the Under-the-Radar Hair Care Product You Need”: “Have you ever used a hair water before? If not, allow us to introduce you to your new best friend. It’s a magical substance, closer to water than hairspray (yet generally still imbued with some of the same frizz-taming qualities of the latter) – and it’s basically your best bet for breathing new life into a dead hairstyle.” *Id.*, at TSDR 19-22; and
- Takasi: offering for sale a spray bottle labeled “GATSBY W Natural Hair Water” and touting the product as “a quick drying hair water that treats hair and allows easy styling.” *Id.*, at TSDR 23-26.

The evidence of third-party use amply shows that HAIR WATER has a normally understood and recognized descriptive meaning in the hair care industry. *See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 223 USPQ 1281,

1285 (Fed. Cir. 1984) (“third-party usage can demonstrate the ordinary dictionary meaning of a term of the meaning of a term to those in the trade”) (internal citation omitted). *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (third-party use and registration of a term may be an indication that a term has a suggestive or descriptive connotation in a specific industry).

Based on the dictionary definitions of “hair” and “water,” and the Internet evidence of use of the term “hair water” by third parties who write about or offer for sale hair care products, we have no doubt that consumers who see the proposed mark HAIR WATER used on the identified “Hair care preparations” immediately would understand that the hair care preparations are made with fortified water, and are used to treat or refresh hair. In the absence of a showing that HAIR WATER has acquired distinctiveness as Applicant’s mark, Applicant’s competitors who might offer similar goods should have the opportunity to use the descriptive term “hair water” or variations thereof to explain a significant feature or characteristic of their goods. *See In re Boston Beer Co., L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff’d*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *Abcor*, 200 USPQ at 217 (“The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.”).

B. Conclusion

For these reasons, we find that Applicant's proposed mark merely describes the Original Goods in Class 3.

Decision: The refusal to accept Applicant's Proposed Amendment under Trademark Rule § 2.71(a) is affirmed.

The refusal to register Applicant's proposed mark HAIR WATER under Section 2(e)(1) of the Trademark Act also is affirmed.